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No. 97-594

In The

Supreme Court of the United States

October Term, 1997

UNISYS CORPORATION,

Petitioner,

vs.

CESKA SPORITELNA, a.s.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a corporate defendant's petition to compel arbitration pursuant to the Federal Arbitration Act was properly denied where both parties admitted, and the district court found, that "there was no agreement between . . . [the parties] to submit this dispute to arbitration."

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RESPONDENT'S OPPOSITION TO MOTION OF FORD MOTOR COMPANY, EASTMAN KODAK COMPANY, AND SHELL OIL COMPANY FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Respondent Ceska Sporitelna, a.s. ("CS") hereby opposes the Motion of Ford Motor Company, Eastman Kodak Company, and Shell Oil Company For Leave to File Brief as *Amici Curiae* (the "Amici Motion") because their accompanying Brief *Amici Curiae* of Ford Motor Company, Eastman Kodak Company, and Shell Oil Company in Support of Petition for a Writ of Certiorari (the "Amici Brief") does not accurately state the facts of this case or the applicable law, and does not "bring to the attention of the Court relevant matter not already brought to its attention by the parties." *See* Supreme Court Rule 37.1.

The Amici Brief, admittedly prepared by Petitioner's own counsel and paid for by the Petitioner, *see* Amici Motion at n.1, also seeks to expand upon the mistaken legal arguments set forth in the Petition by making disputed and unsubstantiated factual claims about how multinational corporations supposedly do business. This has nothing to do with whether the parties to this case had a valid agreement to arbitrate affecting interstate commerce, however, and that is the sole criteria for arbitrability under the Federal Arbitration Act.

For all of these reasons, respondent CS opposes the motion for leave to file the Amici Brief, and respectfully requests that if it is to be considered, the Court also consider the responsive points set forth herein, and in the following Respondent's Supplemental Brief.

RESPONDENT'S SUPPLEMENTAL BRIEF

Respondent Ceska Sporitelna, a.s. ("CS") respectfully submits this supplemental brief, pursuant to Supreme Court Rule 15.8, to present its opposition to the arguments raised in the Amici Brief, which CS did not receive until after its "Respondent's Brief in Opposition" was filed.

As more fully set forth below, the Amici Brief is mistaken in claiming that there is some kind of federal "non-signatory doctrine" extending arbitration agreements to non-parties that never agreed to arbitrate. *See* Amici Brief at 6-7 (referring to an alleged "non-signatory doctrine" in other circuits). In fact, this Court has already held, in a directly applicable decision that the Amici Brief fails to cite or discuss, that the question of whether a non-signatory is bound to an arbitration agreement (or indeed any contract) is governed by state law contract principles (*e.g.*, agency, estoppel, etc.). *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate . . . courts generally . . . should apply ordinary state-law contract principles that govern the formation of contracts.").

The Amici Brief is also mistaken in its claim that arbitration agreements must be "extended" to non-parties in order for corporations to be able to prospectively establish dispute resolution mechanisms. *See* Amici Brief at 11-15. Such "extension" of arbitration agreements is not authorized by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), is not permitted under this Court's decision in *First Options*, and would not be fair or rational — particularly in this case, where the Petitioner consciously chose not to agree to arbitrate with CS.

STATEMENT OF THE CASE

The Amici Brief materially misstates the facts of this case by repeatedly claiming that the action in the court below arises out of "a computer project that was sold under an agreement requiring all

disputes to be resolved through arbitration." *Id.* at 2. This is simply wrong, because as the district court noted in its opinion below (adopted by the Third Circuit), the Petitioner had the opportunity to agree to arbitration, but consciously chose not do so. *See* Appendix to Petition at 10a (district court opinion). Moreover, the European arbitration clauses that the Petitioner sought to invoke, which were contained in English law contracts to which the Petitioner was not a party, were substantively narrow, procedurally specific, and strictly limited to the contracting parties.

The Amici Brief also mischaracterizes the Third Circuit's decision as somehow holding that parent companies can never benefit from arbitration clauses in their subsidiaries' contracts. This is not the case. In fact, the district court specifically pointed out that "if Unisys 'wanted to be able to invoke the arbitration clause(s), (it) should have directed . . . appropriate language in (those) agreements allowing (it) to do so.' " Appendix to Petition at 10a (district court opinion).

The Amici Brief also mistakenly presumes that *all* lawsuits against corporate parents that have not agreed to arbitrate are brought for the purpose of avoiding arbitration with subsidiaries which have agreed to arbitrate, without regard for the myriad possible situations, including this one, in which the parent has committed independent acts of fraud. The Amici Brief also claims, without any basis whatever for doing so, that the action below is simply an attempt to "alleg[e] misconduct against an entity affiliated with the contract party" in order to avoid an arbitration, as if Unisys is merely a conveniently situated party to sue.

The reality, however, is that Unisys is alleged to have committed multiple independent acts of fraud against CS, Appendix to Petition at 17a (district court opinion) ("it does appear that an entire series of misrepresentations were made . . . by six of Unisys's representatives, including its Chairman and CEO"), and as the district court observed, "it is unlikely that an arbitration tribunal would even have jurisdiction over that claim." *Id.* In ignoring these

critical facts, the Amici Brief unfairly distorts the record, and in adopting the Petitioner's statement of the case, it compounds the problem because of the inaccuracies and omissions in that statement. *See* Respondent's Brief in Opposition at 2-6.

ARGUMENT

I.

THE ARGUMENT IN THE AMICI BRIEF THAT ARBITRATION CLAUSES MUST BE "EXTENDED" TO NONPARTIES IN ORDER FOR CORPORATIONS TO PROSPECTIVELY ESTABLISH DISPUTE RESOLUTION MECHANISMS IS ILL-FOUNDED.

The Amici Brief conspicuously raises an argument that the Petitioner is careful to avoid, which is that arbitration agreements should be "extended" beyond their parties in the international arena supposedly because "the personnel and resources of multinational corporations are . . . fluid," and "overlap the functions of the various entities in support of their products and services." Amici Brief at 3. Clearly, however, the amici would take the opposite view if it were suggested that they should be liable for their subsidiaries' contract obligations based such a "fluidity" claim, because as the Amici Brief explains, such subsidiaries are treated as separate legal entities. *Id.* at 12-13.

What the amici really want, therefore, is for this Court to extend to them the contractual arbitration rights of their subsidiaries, without extending to them the contractual obligations (including the obligation to arbitrate) of those subsidiaries — supposedly in the interest of ensuring what the amici call the "sanctity" of "prospectively crafted dispute resolution mechanisms." Amici Brief at 2. This is sophistry, and there no basis for it under federal law. Multinationals, like other entities, cannot demand contractual rights without assuming the concommitant contractual obligations, and when they seek to do so, their arguments ring hollow.

In this regard, the Petitioner has attempted to draw a clear distinction between itself and its subsidiaries, which is the normal approach of a parent company seeking to minimize its liability exposure by claiming, as the Petitioner did here, that its subsidiaries were completely separate entities. *See, e.g.*, Petition at 6 ("many of the alleged misrepresentations . . . were made by employees . . . of Unisys subsidiaries other than the parent Unisys"). Thus, the "fluidity" argument in the Amici Brief would be inapplicable here even if it had any validity, which it does not.

Finally, the record makes it quite clear that in this case, the Petitioner took a series of specific steps to "prospectively" ensure that it could never be compelled to arbitrate. First, it avoided becoming a party to any of the European contracts that contained the limited arbitration provisions. Second, when it issued a guarantee of one of those contracts, it expressly provided that any disputes as to its guarantee obligations would be decided in court, not in arbitration. Third, it did not enter into any agreements with CS as to how or where any other claims against it would be adjudicated. Fourth, it carefully attempted to maintain its position as an entity separate and apart from the European entities with which CS contracted at various times.

Under these circumstances, the argument that this Court should review this case to ensure that corporations can "determine prospectively the forum for disputes," Amici Brief at 4, is ill-founded and inapplicable. The Petitioner voluntarily chose to insulate itself from any contractual obligation to arbitrate with CS, and it makes no sense for this Court to be asked to reverse the effect of that particular decision in order to ensure the "sanctity" of such decisions generally.

II.

THE AMICI BRIEF IS MISTAKEN IN ARGUING THAT THERE IS SOME KIND OF FEDERAL "NON-SIGNATORY DOCTRINE" EXTENDING ARBITRATION AGREEMENTS TO NON-PARTIES.

Both the Amici Motion and the Amici Brief mistakenly suggest that there is some kind of federal "non-signatory doctrine" extending arbitration agreements to non-signatories where those non-signatories are allegedly "involved" in the activities in issue. *See* Amici Motion at 2 (claiming that there is a "non-signatory doctrine" adhered to by other courts of appeals); Amici Brief at 6-7 (referring to an alleged "non-signatory doctrine" in other circuits).

In fact, there is no such doctrine, because the question of whether a non-signatory is bound to an arbitration agreement (or indeed any contract) is governed by state law contract principles (*e.g.*, agency, estoppel, etc.), and this Court has so held in a clearly applicable decision that the Amici Brief does not cite or discuss. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate . . . courts generally . . . should apply ordinary state-law contract principles that govern the formation of contracts."). *See also Eassa Properties v. Shearson Lehman Bros., Inc.*, 851 F.2d 1301, 1304 n.7 (11th Cir. 1988) ("While federal law may govern the interpretation and enforcement of a valid arbitration agreement, state law governs the question of whether such an agreement exists in the first instance.").

As the Second Circuit noted in *Progressive Cas. Ins. Cos. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993):

> [W]hile § 2 of the [Federal] Arbitration Act preempts state law which treats arbitration agreements differently from any other contracts, it also "preserves general principles of state contract law as rules of decision on

> whether the parties have entered into an agreement to arbitrate"

(Emphasis added). *See also Gruntal & Co., Inc. v. Steinberg*, 854 F. Supp. 324, 334 (D.N.J. 1994) ("Because arbitration is a matter of contract, the existence vel non of a valid agreement to arbitrate will be governed by state law principles governing contracts generally"), *aff'd without op.*, 46 F.3d 1116 (3d Cir. 1994).

By ignoring this state law component of the analysis, the Amici Brief mistakenly suggests that the question of whether the Petitioner should be treated as if it were a party to the European arbitration clauses in issue (when it admits that it was not a party to those agreements) should be heavily influenced by a "liberal federal policy" in favor of arbitration. Amici Brief at 4. This approach would stretch the FAA beyond what Congress intended, however, because as the Second Circuit has pointed out, "[t]he purpose of the Federal Arbitration Act was to make arbitration agreements as enforceable as other contracts, *but not more so*." *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 831 (2d Cir. 1988) (emphasis in original). *See also Beckham v. William Bayley Co.*, 655 F. Supp. 288, 291-292 (N.D. Tex. 1987) ("The strong federal policy that favors resolving doubts about an arbitration clause in favor of arbitration cannot serve to stretch a contractual clause beyond the scope intended by the parties").

This Court has specifically held, in a decision the Amici Brief ignores, that "arbitration is simply a matter of contract between the parties," and that "arbitrability . . . depends on whether the parties agreed to arbitrate that dispute." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995). In this case, the Petition admits, and both the district court and the Third Circuit found, that under the applicable state law contract principles, the parties never agreed to arbitrate this or any other dispute. In supposing that there is some kind of federal "non-signatory doctrine" that should override this fact, the Amici Brief is mistaken.

III.

THIS COURT'S DECISION IN *FIRST OPTIONS* ALREADY PROVIDES THE PREDICTABILITY THAT THE AMICI BRIEF CLAIMS IS LACKING.

As with Unisys' Petition, the Amici Brief fails to mention this Court's recent and controlling decision in *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), in which this Court clearly held that "arbitration is simply a matter of contract between the parties." *Id.* at 943. CS has already addressed the applicability of *First Options* to the present case, *see* Respondent's Opposition at 7-8, but several of the points raised by the Amici Brief on this issue warrant a brief further response.

First, the Amici Brief misconstrues the Third Circuit's holding in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3d Cir. 1993), because in that case, the Third Circuit simply held that where "a principal is bound under the terms of a valid arbitration clause," the "agents, employees and representatives" of that principal "are also covered under the terms of such agreements." *Id.* at 1121. This means no more than, as this Court stated in *First Options*, that "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944.

In other words, the Third Circuit's pre-*First Options* decision in *Pritzker* provides for the narrow exception under state law where an agent can enforce its principal's arbitration agreement. No such situation is presented here, as Unisys has never claimed to be the agent of the remote subsidiary with which CS contracted.

Second, the Amici Brief misreads the Third Circuit's post-*First Options* decision in *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 583 (1996), in attempting to draw a distinction between the two groups of

defendants in that case (the Heinz defendants and the Hershey defendants) which the Third Circuit did not draw or rely on. The Amici Brief claims that *Dayhoff*'s treatment of the Hershey defendants "which had no involvement with the contract negotiation and performance" somehow "fits cleanly within the prevailing application of the non-signatory rule, as the conduct alleged [against Hershey] was subsequent and external to the contracts containing the arbitration clause." Amici Brief at 9.

Nowhere in *Dayhoff* is this distinction between the various defendants supported, however. In fact, the Third Circuit did not engage in the "intertwining" analysis advocated by the amici precisely because of this Court's decision in *First Options* one year earlier. Relying on *First Options*'s clear statement that "arbitration is simply a matter of contract between the parties," *Dayhoff*, 86 F.3d at 1294 (quoting *First Options*, 115 S. Ct. at 1924), the Court answered the amici's concerns regarding Heinz in stating

> If Heinz Italia and H.J. Heinz wanted to be able to invoke the arbitration and forum selection clauses, they should have directed Heinz Dolciaria [the signatory subsidiary] to include appropriate language in the 1989 and 1990 agreements allowing them to do so.

Dayhoff, 86 F.3d at 1297.

Third, the amici are incorrect when they state that the district court's decision turned exclusively on its interpretation of the parent-subsidiary language in *Dayhoff*. Amici Brief at 9-10. As the district court explained in its decision below in this case:

> [I]t appears from the *Pritzker*, *Kaplan* and *Dayhoff* line of cases that only where the signatories and non-signatories first share a principal/agent relationship does it matter whether the non-signatories and signatory's interests are co-extensive so as to make the arbitration clause applicable to the non-signatory.

Appendix to Petition at 10a. Clearly, the district court looked not merely at the "formalistic" parent-subsidiary relationship between the Petitioner and its European affiliate, but instead at the question of whether the kind of agent-principal relationship stated in *Pritzker* was present.

Finally, the Amici Brief's brief citation of other circuit cases (which it mistakenly claims are "inconsistent" with the Third Circuit's decision here) is already addressed in Section II of the Respondent's Brief in Opposition at pages 8-12, which is incorporated here by reference.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Respondent's Brief in Opposition, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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